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IN THE

Supreme Court of the United States

October Term, 1953.

No. ..633....

IN THE MATTER OF

The Application to Examine the Books and Records of the ALBERT LINDLEY LEE MEMORIAL HOSPITAL,

DR. ANTHONY J. CINCOTTA,

Petitioner.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

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IN THE MATTER OF

The Application to Examine the Books and Records of the ALBERT LINDLEY LEE MEMORIAL HOSPITAL,

DR. ANTHONY J. CINCOTTA,

Petitioner.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Dr. Anthony J. Cincotta, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in this case on December 18, 1953.

Jurisdiction

The jurisdicton of this Court is invoked under 28 U. S. Code, Section 1254 (1).

The judgment of the Court of Appeals for the Second Circuit which petitioner seeks to have reviewed, was entered December 18, 1953.

Opinions Below

The opinion of the District Court is reported in 115 F. Supp. 643, and is also printed in the record (R. 20-26).

The opinion of the Court of Appeals for the Second Circuit is not yet reported, it is printed in the record (R. 39-43).

Questions Presented

The questions presented by this petitioner are:

1. Whether the law of the State of New York is controlling.

2. Whether the furnishing to the Commissioner of Internal Revenue, by Albert Lindley Lee Memorial Hospital, Fulton, New York, of the names and addresses of Dr. Anthony J. Cincotta's patients admitted to said Hospital, on his instructons, during the years 1946 through 1950 inclusive, will constitute an infringement upon the prohibition or privilege afforded by Sections 352 and 354 of the New York Civil Practice Act.

3. Whether the public interest in the collection of federal taxes outweighs the private rights of citizens afforded by the State of New York to be protected against humiliation, embarrassment or disgrace.

Statutes Involved

28 U. S. Code, Section 1254 (1)

26 U. S. C. A., Section 3614 (a)

Section 352, New York Civil Practice Act.

"Physicians, dentists and nurses not to disclose professional information. A person duly authorized to practice physic or surgery, or dentistry, or a professional or registered nurse, shall not be allowed to disclose any information which he acquired in attending a patient in a professional capacity, and which was necessary to enable him to act in that capacity; unless, in cases where the disclosure of the information so acquired by a dentist is necessary for identification purposes, in which case the dentist may be required to testify solely with respect thereto, or unless, where the patient is a child under the age of sixteen, the information so acquired indicates that the patient has been the victim or subject of a crime, in which case the physician, dentist or nurses may be required to testify fully in relation thereto upon any examination, trial or other proceeding in which the commission of such crime is a subject of inquiry."

Section 354, New York Civil Practice Act.

"Application of sections relating to confidential communications. The last three sections apply to any examination of a person as a witness unless the provisions thereof are expressly waived upon the trial or examination by the person confessing, the patient or the client. But a physician or surgeon, or a professional or registered nurse, upon a trial or examination, may disclose any information as to the mental or physical

condition of a patient who is deceased, which he acquired in attending such patient professionally, except confidential communications and such facts as would tend to disgrace the memory of the patient, when the provisions of section three hundred and fifty-two have been expressly waived on such trial or examination by the personal representatives of the deceased patient, or in any litigation wherein the interests of the personal representative of such deceased patient are deemed by the trial judge to be adverse to those of the estate of the deceased patient, by any party in interest, or if the validity of the last will and testament of such deceased patient is in question, by the executor or executors named in said will, or the surviving husband, widow, or any heir-at-law or any of the next of kin, of such deceased, or any other party in interest. But nothing contained in this section or in section three hundred and fifty-three shall be construed to disqualify an attorney, or his employees, in the probate of a will heretofore executed or offered for probate or hereafter to be executed or offered for probate or in any proceeding whatsoever involving the validity or construction of such a will from becoming a witness, as to the preparation and execution of the will so offered for probate or required to be construed or of any prior will, or of any indenture, deed of trust, or instrument affecting such construction, or as to the revocation of a will, whether such attorney is or is not one of the subscribing or attesting witnesses thereto. But such attorney or his employees, upon a trial or examination, shall not be permitted to disclose any confidential communications which would tend to disgrace the memory of the decedant. The waivers herein provided for must

be made in open court, on the trial of the action or proceeding, and a paper executed by a party prior to the trial providing for such waiver shall be insufficient as such a waiver. But the attorneys for the respective parties, prior to the trial, may stipulate for such waiver, and the same shall be sufficient therefor."

Statement

On November 5, 1952, a special agent of the Bureau of Internal Revenue served on the Albert Lindley Lee Memorial Hospital, Fulton, N. Y., a summons issued pursuant to 26 U. S. C. A., Section 3614 (a) requiring the said Hospital to furnish the names and addresses of Dr. Anthony J. Cincotta's patients admitted to the said Hospital, on his instructions, during the years 1946 through 1950 inclusive (R. 4, 5). The Hospital having refused to comply with the summons, the United States Attorney for the Northern District of New York applied to the District Court pursuant to 26 U. S. C. A., Secton 3633 and obtained an ex parte order directing the Hospital to allow the Internal Revenue agent to inspect its books in order to obtain the names and addresses of Dr. Cincotta's patients admitted to the Hospital during the tax years in question. Dr. Cincotta moved for leave to intervene, which was granted, and for vacation of the ex parte order. The Hospital made a similar motion to vacate.

The motions to vacate the ex parte order, by Dr. Cincotta and the Hospital, were denied in a memorandum-decision by Hon. Stephen W. Brennan, U. S. D. J. (R. 20-26).

The order was affirmed in an appeal to the United States Court of Appeals for the Second Circuit, wherein Swan, Circuit Judge, wrote an opinion (R. 39-43).

The persons most vitally concerned in this proceeding, whose fundamental and substantial rights are involved, namely the patients of Dr. Cincotta, are not parties to this proceeding and have no opportunity to protect themselves by either asserting or waiving the privilege afforded patients of a physician by the laws of the State of New York.

Specification of Errors to be Urged

The United State Court of Appeals for the Second Circuit erred:

1. In holding that this is a matter to be decided according to Federal law.

2. In holding that the information sought by the Commissioner of Internal Revenue is not privileged under the law of the State of New York.

3. In holding that the public interest in the collection of taxes outweighs the private rights of citizens afforded by the State of New York to be protected against humiliation, embarrassment or disgrace.

4. The Court of Appeals erred in affirming the decision of the District Court.

Reason relied upon for granting the Writ.

The Court of Appeals has decided an important question of Federal Law which has not been, but should be, settled by this Court.

Neither the Federal Constitution nor Acts of Congress prescribe rules for the admissibility of evidence in proceedings by the Bureau of Internal Revenue. As there is no

Federal Common Law, the law of the State of New York must be applied herein. This Court has held "Except in matters governed by Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State. And whether the law of the State shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern. There is no federal common law." *Erie Railroad* vs. *Tompkins*, 304 U. S. 64.

Secton 352 of the New York Civil Practice Act expressly forbids the disclosure by a physician of any information which he acquired in attending a patient in a professional capacity. Section 354 of the New York Civil Practice Act provides that the provisions of Section 352 of the said Act " * * * apply to any examination of a person as a witness unless the provisions thereof are expressly waived upon the trial or examination by the person confessing, the patient or the client." Sectons 352 and 354 of the New York Civil Practice Act, which were enacted by the New York State Legislature, are quoted above under "Statutes Involved."

Hospital records are confidential and privileged communications and come within the purview of Section 352 of the New York Civil Practice Act.

Vilardi vs. Vilardi, 200 Misc. 1043 (107 NYS 2d 342).

Jaffe vs. City of New York, 196 Misc. 710 (94 NYS 2d 60).

Thompson vs. Prudential Insurance Co. of America, 266 App. Div. 783 (41 NYS 2d 621).

The prohibition against disclosure of privileged communications applies to investigations as well as to judicial proceedings. In connection with an investigation by a committee appointed by the New York City Council to investigate charges of negligence, etc., in treatment of patients at a specified hospital, subpoenaes duces tecum were issued, "which required the production of specified records of the hospital." The New York Court of Appeals held that the records were privileged communications and that the prohibition of Section 352 of the New York Civil Practice Act applied to any examination, that "the Statute should have a broad and liberal construction to carry out its policy * * *. The Legislature which has conferred the privilege may, if it chooses, limit its application. *The Courts may not do so.*"

New York City Council vs. Goldwater, 284 NY 296.

The protection of the patient is the sole basis and reason for privileged communications. Where there is any question as to whether or not communications are confidential and privileged "it is certainly best to err upon the side of safety and shut the door against all disclosures of information acquired by a physician in attending a patient in a professional capacity, without requiring absolute proof that such information was necessary to enable him to act in that capacity."

Re *Darragh's Estate*, 52 Hun. 591, 610 (5 NY Supp. 58). The New York Court of Appeals, in *McKinney vs. Grand Street, Prospect Park & Flatbush Railroad Co.*, 104 NY 352, referring to privileged communications to a physician, held:

"The intent of the Statute in making such informa-

> tion privileged is to inspire confidence between patient and physician, to enable the latter to prescribe for and advise the former most advantageously and remove from the patient's mind any fear that she may be exposed to civil or criminal prosecution, or shame or disgrace, by reason of any disclosures thus made."

and, in *People vs. Bloom*, 193 NY 1, the Court of Appeals of New York held that the object of the statute governing privileged communications

> "is to prevent the disclosure of delicate and confidential matters, which might humiliate the patient in his lifetime and disgrace his memory when dead, so as to enable him to consult a physician in safety, knowing that his lips would be sealed by the law until he, himself, removed the seal."

Patients must be protected from the possibility of shame, humiliation or disgrace. Medical specialists and many other physicians are generally known to make a specialty of treating cancer, venereal diseases, mental diseases, tuberculosis, alcoholism, etc.; many women are referred to hospitals, by their physicians, for treatment and surgery of diseases and disorders of the pelvic cavity, and frequently children born out of wedlock are delivered by the attending physician in hosptials. Dr. Anthony J. Cincotta, your petitioner, treated patients in Albert Lindley Lee Memorial Hospital for some of the aforesaid diseases and conditions and delivered children born out of wedlock in the said Hospital during the years 1946 through 1950 inclusive.

It must be presumed that the Bureau of Internal Revenue seeks the names and addresses of Dr. Cincotta's patients confined in the Lee Memorial Hospital during the tax years in question for the sole purpose of communicating

with the patients to determine the amount, if any, which the patients paid Dr. Cincotta. Mothers of some of the children born out of wedlock, whose children were delivered in the said Hospital by Dr. Cincotta during the tax years in question, have subsequently married without disclosure to their husbands the fact that they bore children prior to their marriage. That these patients would suffer shame, humiliation and disgrace, by disclosure of their names and addresses from the records of the Albert Lindley Lee Memorial Hospital, and the subsequent communication with them by the Bureau of Internal Revenue, is certain. Contact of the patients, whose names and addresses may be procured from the records of the said Hospital, by the Bureau of Internal Revnue, would be an infringement of the patients' fundamental and substantial rights. *This is the inherently vicious nature of this proceeding.*

In *People vs. Bloom*, 193 NY 1, the New York Court of Appeals held:

> "When a secret is out, it is out for all time and cannot be caught again like a bird and put back in its cage."

In *Woerner vs. Electromatic Typewriters Inc.*, 271 NY 228, the New York Court of Appeals, in 1936, held:

> "For over 100 years it has been the law of this State that a physician should not be allowed to disclose any information which he acquired attending a patient in a professional capacity. * * * Its purpose (New York Civil Practice Act, Section 352) is to protect those who are required to consult physicians from the disclosure of secrets imparted to them; to protect the relationship of patient and physician and to prevent physicians

from disclosing information which n ch might result in humiliation, embarrassment or disgrace to patients."

The persons most vitally concerned i ed in this proceeding, whose fundamental and substantial rig l rights are involved, namely the patients of Dr. Cincotta, are are not parties to this proceeding and have no opportunity to p to protect themselves. Only the patients themselves can waive th ve the privilege afford- ed by Section 352 of the New York Civil Civil Practice Act and the privilege must be expressly waived ived upon the trial or examination, Section 354, New York C rk Civil Practice Act. Without such waiver the information ion is shut off at its source.

NY Supp 2d 203.

Re Erickson's Will, 106 NY Supp 2d 634.

Re Handwerger, 79 NY Supp

The privilege of communications betw between confessor and penitent, patient and physician and atto attorney and client is a vital, fundamental and substantial ri al right and is an essential rule of evidence. The revelation o ion of any information which might violate this privilege is ab is abhorrent and must not be permitted in judicial proceedin edings, administrative hearings or investigations. The courts h gts have been liberal in relaxing the ordinary laws of evidence dence in administrative hearing but they have not abolished the l the rules of evidence. It has been held that administrative ag ve agencies have never been restricted by the "*rigid rules of ev of evidence*", *Federal Trade Commission vs. Cement Institute idence*, 333 US 683, 705 and 706, nor by the "*technical rules for titute, et al.* for the exclusion of *evidence*", *Interstate Commerce Commis mmission vs. Baird*, 194 US 25, 44, such as "remote hearsay" an sy" and "mere rumor," *Consolidated Edison Co. vs. National* ional Labor Relations *Board*, 305 US 197. But, persons cannot b annot be deprived of vi-

tal, fundamental and substantial rights under the guise of relaxing the "strict", "rigid", "technical" rules of evidence. In *Interstate Commerce Commission vs. Louisville and Nashville Railroad Co.*, 227 US 88, this Court held

> "The Commission is an administrative body and, even where it acts in a quasi judicial capacity, is not limited by the strict rules, as to the admissibility of evidence, which prevails in suits between private parties. But the more liberal the practice in admitting testimony, the more imperative the obligation to preserve the essential rules of evidence by which rights are asserted or defended.",

and in *Bridges vs. Wixon*, 326 US 135, this Court held:

> "It is true that the courts have been liberal in relaxing the ordinary laws of evidence in administrative hearings. Yet as was aptly stated in *Interstate Commerce Commission vs. Louisville & N. RR. Co.* (supra) 'but the more liberal the practice in admitting testimony, the more imperative the obligation to preserve the essential rules of evidence by which rights are asserted or defended.' "

The prohibition against disclosing privileged communications is a vital, fundamental and substantial right and is an essential rule of evidence.

It is most respectfully and most strongly urged that the public interest in the collection of taxes does not outweigh the private right of a patient to the protection of the laws of privileged communications enacted by the State of New York. The United States of America was founded upon and for the protection of the rights of the individual. The right of secrecy of communication between patient and physician is sacred. This sacred right must not be endangered by any

possibility of a violation for any purpose. It is not only a vital, fundamental and substantial right, it is paramount to the public interest in the collection of taxes. The vicious nature of this proceeding is the possibility of shame, humiliation or disgrace coming to a patient as a result of being contacted by the Bureau of Internal Revenue, after the Bureau has procured the name and address of the patient from the Hospital.

CONCLUSION

It is therefore respectfully submitted that for the reasons above stated this petition for a writ of certiorari should be granted.

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March 5, 1954.

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In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 633

DR. ANTHONY J. CINCOTTA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The memorandum decision of the United States District Court (R. 20-26) is reported at 115 F. Supp. 643. The opinion of the Court of Appeals (R. 39-43) is reported at 209 F. 2d 122.

JURISDICTION

The judgment of the Court of Appeals was entered on December 18, 1953. (R. 43.) The petition for a writ of certiorari was filed on March 13, 1954. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254.

QUESTION PRESENTED

Whether the Court of Appeals erred in affirming the order of the District Court directing a hospital to furnish, for a revenue agent's inquiry under authority of Section 3614(a) of the Internal Revenue Code, the names and addresses of petitioner's patients who had been confined in that hospital during the years 1946 to 1950, inclusive.

STATUTES INVOLVED

Internal Revenue Code:

> SEC. 3614. EXAMINATION OF BOOKS AND WITNESSES.
>
> (a) *To Determine Liability of the Taxpayer.* —The Commissioner, for the purpose of ascertaining the correctness of any return or for the purpose of making a return where none has been made, is authorized, by any officer or employee of the Bureau of Internal Revenue, including the field service, designated by him for that purpose, to examine any books, papers, records, or memoranda bearing upon the matters required to be included in the return, and may require the attendance of the person rendering the return or of any officer or employee of such person, or the attendance of any other person having knowledge in the premises, and may take his testimony with reference to the matter required by law to be included in such return, with power to administer oaths to such person or persons.
>
> * * * * *
>
> (26 U.S.C. 1946 ed., Sec. 3614.)

SEC. 3633. JURISDICTION OF DISTRICT COURTS.

(a) *To Enforce Summons.*—If any person is summoned under the internal revenue laws to appear, to testify, or to produce books, papers, or other data, the district court of the United States for the district in which such person resides shall have jurisdiction by appropriate process to compel such attendance, testimony, or production of books, papers, or other data.

* * * * *

(26 U.S.C. 1946 ed., Sec. 3633.)

New York Civil Practice Act:

SEC. 352. *Physicians, dentists and nurses not to disclose professional information.*

A person duly authorized to practice physic or surgery, or dentistry, or a registered professional or licensed practical nurse, shall not be allowed to disclose any information which he acquired in attending a patient in a professional capacity, and which was necessary to enable him to act in that capacity; unless, in cases where the disclosure of the information so acquired by a dentist is necessary for identification purposes, in which case the dentist may be required to testify solely with respect thereto, or unless, where the patient is a child under the age of sixteen, the information so acquired indicates that the patient has been the victim or subject of a crime, in which case the physician, dentist or nurse may be required to testify fully in relation thereto upon any examination, trial or other proceeding in

which the commission of such crime is a subject of inquiry.

SEC. 354. *Application of sections relating to confidential communications.*

The last three sections apply to any examination of a person as a witness unless the provisions thereof are expressly waived upon the trial or examination by the person confessing, the patient or the client. * * *

STATEMENT

On November 5, 1952, the Commissioner of Internal Revenue, acting under authority of Section 3614 of the Internal Revenue Code, issued a summons (R. 4-5) to the Albert Lindley Lee Memorial Hospital requiring it to appear before a special agent of the Internal Revenue Service and give testimony concerning the tax liability of Dr. Anthony J. Cincotta, petitioner herein, and further directing it to produce all books, papers, records, and memoranda relating to the names and addresses of petitioner's patients admitted to that institution during the years 1946 through 1950.

The hospital refused to comply with the summons, and on January 23, 1953, the United States District Court for the Northern District of New York entered an order directing the hospital to allow a special agent of the Intelligence Division of the office of the Director of Internal Revenue for the 21st District of New York to inspect its books in order to obtain the names and addresses of petitioner's patients confined in the hospital during the period 1946 through 1950. (R. 6-7.)

On February 4, 1953, an order (R. 8-10) was granted upon motion of petitioner requiring the Director to show cause why the order requiring the hospital to permit the inspection of its books and records should not be vacated upon the ground that compliance therewith "would constitute divulging privileged and confidential communications" by the hospital. On the same date, an order (R. 15-16) was entered granting petitioner leave to intervene in the proceeding.

A similar order (R. 29-31) to show cause was procured by the hospital.

After hearing upon the motions to vacate the order, the District Court filed a memorandum decision denying the motions. The Court held that disclosure of the names and addresses of petitioner's patients, which was all its order required, involved no violation of the doctor-patient privilege under the New York statutes. (R. 20-26.) The Court of Appeals affirmed the order of the District Court. (R. 43.) [1]

ARGUMENT

The order of the District Court directed the hospital to disclose only the names and addresses of petitioner's patients who had been confined in the hospital. (R. 42.) The Court of Appeals agreed with the holding of the District Court that this information was not privileged under the New York statutes petitioner invokes. (R. 20-26, 40-41.) That holding is clearly in accord with the state

[1] The hospital apparently abandoned its appeal since it filed no brief. (R. 40.)

statutes and with the state decisions construing them.[2] It is in itself sufficient to dispose of petitioner's contentions and to demonstrate the absence of occasion for further review by this Court.

The Court of Appeals held, in any event (R. 41-42), that determination of what evidence is admissible in an income tax investigation under Section 3614(a) of the Internal Revenue Code (*supra*, p. 2) was a matter to be decided according to federal, rather than state, law. This conclusion accords with the decision in *Falsone* v. *United States*, 205 F. 2d 734 (C.A. 5), certiorari denied, 346 U. S. 864, and is, we think, clearly correct. Thus, even if the New York law had the effect of keeping secret the names of petitioner's patients, such an impediment could not operate to disable at its outset the investigation of petitioner's income for purposes of the federal revenue. This conclusion by no means entails holding testimonial privileges unavailable in such investigations; on the contrary, the Court of Appeals assumed *arguendo* (R. 42) that these investigations are subject to the same privileges as judicial proceedings.[3] As the Court pointed out, however (R. 42), the revenue agent in this case was not seeking privileged information as to the nature of any pa-

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[2] See *Falkenhainer* v. *Falkenhainer*, 198 Misc. 29; *Klein* v. *Prudential Ins. Co.*, 221 N. Y. 449, 453, 117 N. E. 942. In the cases petitioner cites (Pet. 7-11), the information sought was held privileged because it related to the diagnosis and treatment of a patient's illness—not merely, as here, to the patient's name and address.

[3] See *McMann* v. *Securities and Exchange Commission*, 87 F. 2d 377, 378 (C. A. 2).

tient's illness, but only the names an nes and addresses of petitioner's patients in order to ler to interrogate them on matters pertaining to petition etitioner's income tax liability for the years under investi investigation. And as the Court further noted (R. 42-43), 42-43), the District Court carefully directed the hospital ospital to take all precautions necessary against disclosu isclosure of privileged information, and invited the par the parties to seek further instruction in this respect if ect if they so desired.

The propriety of this order is so cle so clear in either case that the question whether federal o deral or New York law applies is academic. What is ever is even clearer is that the ultimate issue of New York law ork law petitioner raises, adequately resolved by both co both courts below, presents no basis for certiorari.

CONCLUSION

For the reasons stated, the petition fc tition for a writ of certiorari should be denied.

Respectfully submitted,

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